Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

79-402

No. .....

MILDA R. SANDSTROM,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner, Milda R. Sandstrom, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered in this proceeding.

OPINION BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 225 Kan. 717, 595 P.2d 324 (1979). A copy of this opinion appears in Appendix "A".

JURISDICTION

The opinion of the Kansas Supreme Court was entered on May 5, 1979, and Motion for Rehearing was timely filed and denied on June 13, 1979. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Sixth and Fourteenth Amendments to the Constitution of the United States, granting the right to be personally present at all stages of a criminal proceeding, can be forfeited by claim of counsel that he had "carte blanche" authority to waive the defendant's presence, thereby denying the right to attend the ruling on motion for judgment of acquittal and an *in camera* hearing into juror misconduct resulting in the subsequent disqualification and replacement of the juror in absence of defendant.

2. Whether the Fifth Amendment privilege against compulsory self-incrimination prohibits the forced production by defendant of statements and narrative reports of possible witnesses when such order for production extends to statements and reports of witnesses not yet called at trial and requires production of all such statements prior to commencement of the defendant's evidence.

3. Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment prohibit the State of Kansas from retaining the standard for criminal responsibility commonly referred to as the "M'Naghten" rule in view of the nearly universal adoption of Federal Courts including the Tenth (10th) Circuit of the different and better based standard known as the ALI test.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment:

> § 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Statutes

Kansas Statutes Annotated, 22-3405:

The defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes.

Kansas Statutes Annotated, 22-3212 §§ 1-3:

(1) Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may

become known, to the prosecuting attorney; (c) recorded testimony of the defendant before a grand jury or at an inquisition; and (d) memoranda of any oral confession made by the defendant and a list of the witnesses to such confession, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney.

(2) Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution upon a showing of materiality to the case and that the request is reasonable. (Except as provided in subsections (1) (b) and (1) (d), this section does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) except as may be provided by law.

(3) If the court grants relief sought by the defendant under subsection (1) (b) or subsection (2) of this section, it may, upon motion of the prosecution, condition its order by requiring that the defendant permit the attorney for the prosecution to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial, upon a showing of materiality to the case and that the request is reasonable. Except as to scientific or medical reports, this subsection does

not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys.

Kansas Statutes Annotated, 22-3213 §§ 1, 2 & 4:

(1) In any criminal prosecution brought by the state of Kansas, no statement or report in the possession of the prosecution which was made by a state witness or prospective state witness (other than the defendant) shall be subject of subpoena, discovery, or inspection until said witness has testified on direct examination at the preliminary hearing or in the trial of the case.

(2) After a witness called by the state has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement (as hereinafter defined) of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(4) The term "statement", as used in subsections (2) and (3) of this section in relation to any witness called by the prosecution means—

(a) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement.

STATEMENT OF THE CASE

This action commenced as a result of the May, 1977 shooting of Thad Sandstrom, a broadcast executive with Stauffer Publications in Topeka, Kansas. Generally, the evidence showed that petitioner, while visiting friends in Oklahoma, was informed her husband of nearly twenty-four years had filed for divorce. She returned home, arriving in the early hours of the morning, and shot her husband while he was in bed. Immediately thereafter, she dressed herself in a nightgown, placed a button saying "I love you" on his lapel, kissed him, and climbed into bed with him. They were later discovered by a mutual friend whom petitioner had called. When she was discovered, no signs of life were detected and she was taken to the emergency room where, in the opinion of the treating physician, she was suffering from a psychotic break. Petitioner was later charged with first degree murder. After trial, at which the major defense was insanity, she was convicted and sentenced to life imprisonment. Prior to trial, petitioner, having provided notice of intent to rely on defense of insanity, requested the trial court by written motion (Record, Volume III) to determine that the M'Naghten rule respecting criminal responsibility be replaced by the American Law Institute (ALI) test. After the question was briefed for the Court, it was determined that the M'Naghten rule should be retained and the Court instructed the jury accordingly.

After close of the state's case in chief, the special prosecutor moved the Court for an order requiring petitioner to turn over certain documents to the state as follows:

> MR. BENNETT: Then, we would at this point move the Court for an Order requiring Mr. Hecht, prior to the commencement of his case, to provide us with any and all copies of statements that he has obtained from any of the witnesses that he intends to produce, or any narrative reports of investigators relative to verbal statements that they have taken from witnesses who are going to testify for the defense in this case.
>
> The Court ordered it done by the State; and certainly, we would submit that under the statute the people of the State of Kansas have just as much right to equal treatment, and we would so request.

(Record, Transcript, Volume IV, p. 460).

After further discussion and objection by defense counsel, the Court ordered as follows:

> THE COURT: Well, I see no reason in connection with this, Bob, that Monday morning you couldn't turn over to them any statements you have taken of people that will testify, the same way they did to you.
>
> MR. HECHT: I won't unless the Court sustains their motion.
>
> THE COURT: Well, I'll sustain the motion, and let's do it Monday morning when you begin the presentation of your case.

(Record, Transcript, Volume IV, pp. 462-463).

On Monday, the following transpired:

> MR. HECHT: If the Court please, now, then you directed us to, I guess it was Thursday, to give our statements, and we would renew our objection in that it constitutes a violation of our work product and is not mandatory under 22-3212; but if the Court directs us to do so, we will do it with those objections.
>
> THE COURT: You're so ordered.

(Record, Transcript, Volume V, p. 653).

There is a memorandum brief in Record Volume III, 252-270, which sets out the position taken by the defendant. Following the conviction, in a motion to vacate the verdict or set it aside, oral argument was made as shown in Record Volume III, Transcript dated January 19, 1978. The items which the Court required to be turned over were copies of statements from any of the witnesses which the defense intended to produce or narrative reports of investigations relative to verbal statements which had been taken from witnesses who were going to testify for the defense.

During the same period of time after the State's evidence and prior to commencement of the defendant's case, the Court, counsel, and court reporter retired to chambers for presentation of a motion for judgment of acquittal. The record does not reflect that the defendant knew that the motion was to be taken up or whether or not she was invited to the conference, either by the Court or by her counsel.

The record is clear, however, that the defendant was absent and was so noted by the Special Prosecutor, as shown as follows:

(Thereupon, at 4:00 o'clock p.m., the jury trial was in recess; and at 4:10 o'clock p.m. an in-Chambers hearing was had in the presence of the Court, counsel; and the defendant and the jury not being present, the following proceedings were had; to-wit:)

THE COURT: All right, we're in Chambers, and the State has rested their case, and Mr. Hecht has a motion.

MR. BENNETT: Before we take up the motion, Judge, I think we ought to reflect on the record that the defendant is not here and that she has waived, by waiver of counsel, any right to be present.

MR. HECHT: That's correct, Your Honor.

THE COURT: All right.

(Record, Transcript, Volume IV, pp. 620-621).

The Court took the motion under advisement with agreement to have a decision by Monday the following week. The following transpired at the subsequent hearing:

(Thereupon, on December 5, 1977, at 8:45 o'clock a.m., the jury trial resumed with an in-Chambers hearing in the presence of the Court, counsel, and also present was Gene Obley, Court Services, Shawnee County Courthouse, but out of the presence of the defendant and the jury, the following proceedings were had; to-wit:)

THE COURT: All right, we have got two matters to take up in this case. Number one, with regard to the motion made at the end of the day by Mr. Hecht, the Court is overruling the same and will cite, just for the record, State versus Coltharp, C-o-l-t-h-a-r-p, 199 Kan. 598; the State versus Harden, 206

Kan. 365; and 17 ALR. Third, Bradford versus State of Maryland, and that motion will be overruled.

Now, the, I have here, in connection with phone call that I made to you gentlemen, Mr. Gene Obley of the Adult Probation Department. I would like for Gene to tell you gentlemen exactly what led to my phone call to you.

MR. BENNETT: Before you get into that, again, the defendant isn't here, and I think just so there is no question—

MR. HECHT: (Interrupting) She waives her right to be present.

THE COURT: All right. Would you please relate now exactly what you know, and what you've done, and who told you what, so counsel will be fully apprised.

(Record, Transcript, Volume V, pp. 633-634).

The transcript goes on to reveal discussion regarding misconduct by a juror and the subsequent decision to examine the juror, which examination continued outside the presence of petitioner. It became apparent the juror had made comments to five or six people about the case and she was discharged without consulting the petitioner and without being asked about comments made to the remaining members of the jury. She was replaced by one of the alternates and the case continued.

The petitioner was found guilty of first degree murder, judgment entered, and she was sentenced to life imprisonment from which appeal was taken directly to the Kansas Supreme Court. A copy of the judgment appears in Appendix "B".

The questions presented to this Court were again raised on appeal and rejected. Motion for rehearing was denied on June 13, 1979, as appears in Appendix "C". The Kansas Supreme Court's mandate and judgment was entered June 25, 1979.

REASONS FOR GRANTING THE WRIT

(A) The Decision Below, Denying Petitioner's Right to Be Present at a Hearing to Determine Misconduct of a Juror, Conflicts With Applicable Decisions of This Court and the Weight of Authority, Presents a Question Not Heretofore Determined by This Court, and Establishes a Significant Departure From Contemplated Rights Under the Sixth and Fourteenth Amendments to the United States Constitution.

It would appear the State of Kansas concedes the right to be present at all times during the trial of the criminal case is one of the fundamental rights to which every defendant is entitled. This, according to the legion of the cases decided, would include the hearing on a Motion for Judgment of Acquittal as well as a hearing where inquiry is made into the misconduct or possible misconduct of a juror. See *People v. Medcoff*, 344 Mich. 108, 73 N.W.2d 537 (1955). As long ago as *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), this Court recognized the constitutional necessity of having the defendant present at the challenging of jurors. *Accord, Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892). *See also, Shields v. United States*, 273 U.S. 583, 47 S.Ct. 478, 71 L.Ed. 787 (1927); *Illinois v. Allen*, 379 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Snyder*

v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934); *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975).

This case, however, involves more than the simple issue of whether attendance at the hearing for the potential disqualification of a juror is a right to which the defendant in a criminal case is entitled. Rather, here the question to be determined and clarified involves the waiver of such a right. In its decision, the Kansas Supreme Court has attempted to shelter itself from the decisions of this and the majority of Courts in the country, disregarded even its own previous opinions, and refused to acknowledge the Constitutional infraction apparent in the instant case, the occurrence of which places before this Court a question not previously considered.

As is pointed out in the statement of facts, an *in camera* hearing into juror misconduct and subsequent dismissal and replacement of the juror took place in absence of defendant. It is conceded that petitioner's counsel was present and made a claim of waiver upon inquiry by the special prosecutor. However, neither the Court, State nor petitioner's trial counsel significantly concerned themselves with the presence and aid of the defendant. In fact, when the hearing commenced and later progressed to an interview of the juror, something not contemplated at the time the attempted waiver took place, no concern was shown over the fact that petitioner was not present despite the recognition that she ought to be entitled to discover along with each one present what was about to unfold. Even if trial counsel felt he had authority and the ability to proceed in absence of petitioner, it was her choice rather than his and the attempted waiver, without even consulting his client was improper, unauthorized, and cannot take from her the protection granted by the Sixth Amendment.

What is perhaps implicit in the confrontation clause of the Sixth Amendment is the recognition that members of the bar are neither omnipotent nor clairvoyant. Each might well be aided by the suggestions and advice of the defendant in matters such as this. As is so aptly pointed out in *Snyder v. Massachusetts, supra,* "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Id.* at 106. The necessities of the defense may not be met by the presence of counsel only. *Hopt v. Utah, supra.*

The Supreme Court of Kansas has, contrary to these decisions, found from the cold record that valid waiver did exist. Their statement that "On the basis of the record now before us, it is undisputed that the defendant *through her counsel* waived her right to be present at the hearings held on December 1, 1977, and December 5, 1977;" is completely opposite the clear mandate of this Court and the Sixth and Fourteenth Amendments to the United States Constitution.

Even the Kansas Supreme Court has acknowledged this point in *State v. Hinkle,* 176 Kan. 152, 269 P.2d 465 (1954), where it was said:

> Under those authorities counsel for appellant in this case contend that she could waive her right to be present at all times. The contention is not well taken. The language with reference to defendant's right to waive his presence used in those opinions must be limited to the facts therein stated. More than that, in each of those cases, the defendant personally claimed the waiver. *Here her attorney, alone made the claim. This procedure is not recognized by any of the authorities.*

Id. at 157-158. (Emphasis supplied). Thus, this state has conclusively established, as have the other jurisdictions, that assuming, *arguendo,* trial counsel had the defendant's "carte blanche" authority to waive such a fundamental right, the same is ineffective. It is clear that such a waiver must appear from the record which must show the Court exhaustively inquired of the defendant personally that she understood her right to be present and voluntarily waived it. Suffice it to say that nowhere in the record does it appear that petitioner was sufficiently consulted about what transpired in chambers. In fact, nobody knew what was to take place. She could not have either acquiesced in what transpired out of her presence or have made a knowing and intelligent waiver of her right to be present:

> "The right of a criminal defendant to be present personally at all stages of the proceedings may be waived or forfeited. *Illinois v. Allen, supra.* However a valid waiver requires an intentional relinquishment or abandonment of a known right or privilege, *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938), and the waiver of a constitutional right will not be presumed from a silent record. *Carnley v. Cochran,* 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962)."

Of course this right and the burden of showing a waiver by the accused of such a right imposes a weighty responsibility upon the trial judge. However, as *Carnley v. Cochran, supra,* points out, such a responsibility should exist. The waiver must be clearly determined, and it must appear upon the record. In its absence, the waiver will not be implied and every reasonable presumption will be indulged against the waiver. *Hodges v. Easton,* 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169. One may not

presume that acquiescence constitutes waiver, as the prosecutor has the entire responsibility, in conjunction with the trial judge, to establish on the record an intelligent and understanding waiver of such a fundamental right. *Barker v. Wingo,* 407 U.S. 514, 95 S.Ct. 2182, 33 L.Ed.2d 101. *C.F. Carnley v. Cochran, supra.*

Of particular importance, as well, is the fact that this case is one dealing with the question of criminal responsibility by virtue of a plea of insanity. Keeping in mind the evidence portrayed the picture of a deeply disturbed individual, it is inconsistent to argue or even assume a knowing and intelligent waiver. As well, it need be pointed out that the court did not inquire of either the discharged juror or other jurors to determine whether any improper comments had been made. This, despite the knowledge that the juror had made comments to at least five different individuals with respect to the facts of the case as she had heard them in the courtroom.

The result is that this case is ripe for a decision. It does not involve anything less than one of the most fundamental rights accorded to an individual under the Constitution of our United States. Yet, the ruling as propounded by the Kansas Supreme Court conflicts with clear Constitutional mandates explained by this Court, the effect of which is to deny to each of us, and particularly the petitioner, the benefit of all rights to which she is so rightly entitled.

(B) The Decision Below Misinterprets This Court's Holding in *United States v. Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), and Extends It Beyond Its Intended Scope.

The Kansas Supreme Court has sought to extend the case of *United States v. Nobles,* 422 U.S. 225, 95 S.Ct.

2160, 45 L.Ed.2d 141 (1975), well beyond what this Court intended. In *Nobles* defense counsel sought to impeach two prosecuting witnesses with the testimony of an investigator who had previously talked to those witnesses. The statements given to the investigator were different from their testimony at trial and the Court ordered defense counsel to produce the statements at the time the investigator was called to testify. In the instant case, the defendant was required to produce statements and narrative reports of any witnesses who might be called in support of the defendant's position which order was not limited purely to impeachment matters but went well beyond the realm of that produced in *Nobles.*

This Court held in *Nobles* that the Fifth Amendment privilege against compulsory self-incrimination did not extend to the statements of third parties who had already been called as witnesses at trial. Nevertheless, the Kansas Supreme Court, by finding the production order to be harmless error and not of Constitutional consequence, has purported to extend *Nobles* to statements and reports of witnesses not yet called. Thus, petitioner was forced into the position of possibly supplying the link from which the jury determined conviction was necessary. Such required conduct on the part of the trial Court clearly violated the Fifth Amendment privilege against self-incrimination and a determination from this Court is necessary to avoid future difficulties.

While *Nobles* concluded that the Fifth Amendment privilege was personal to the defendant and did not extend to the testimony of statements of third parties called as witnesses at trial, it is sincerely urged that this Court not extend such holding to discovery of statements as provided in this case. The instant case closely resembles that of *Prudhomme v. Superior Court of L.A. County,*

85 Cal. Rptr. 129, 466 P.2d 673 (1970), where the defendant in a pending murder case was required to disclose names, addresses, and expected testimony of witnesses to be called by the defendant at trial. This bears a remarkable similarity to the discovery order issued in the instant case. *Prudhomme* determined that the privilege in such an instance would be good if any of the compelled disclosures might possibly serve as a "link in a chain" of evidence tending to establish guilt of criminal offense. The Court ruled that:

> Applying the foregoing test to the discovery order in the instant case, neither the order nor the record below enables us to say that it clearly appears that disclosure to the prosecution of the names, addresses and expected testimony of petitioner's witnesses cannot possibly tend to incriminate her . . . (t)he order herein is not limited to any particular defense or category of witnesses from which a court could attempt to determine its incriminatory effect. It requires no great effort or imagination to conceive of a variety of situations wherein the disclosure of the expected testimony of defense witnesses or even their names and addresses, could easily provide an essential link in a chain of evidence underlining the prosecutions case and chief.

Id. at 677.

Unquestionably, the documents, reports, and statements forced to be disclosed in the instant case were privileged, the Court's order was too broad and constituted a substantial violation of the petitioner's Fifth Amendment right against compulsory self-incrimination. Inasmuch as the record does not indicate such error was not prejudicial, the defendant has been denied a fair trial and review by this Court is necessary.

(C) In View of the Varying Uncertainty Among State Jurisdictions, a Universal Standard for Criminal Responsibility, Compatible With the Due Process and Equal Protection Clause of the Constitution of the United States, Should Be Established.

In view of the nearly universal adoption by the Federal Courts[1] of the standard of criminal responsibility commonly referred to as the ALI Test, it is proper for this Court to determine, at this point in time, that the "M'-Naghten" Rule as a standard for criminal responsibility is outmoded and its use violates the Due Process and the Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Of course, the difference in these rules is significant inasmuch as the former acknowledges that the test for criminal responsibility takes into account both the inability to appreciate or understand the criminality of one's conduct as well as the inability to conform such conduct to the requirements of the law, despite an awareness of whether the conduct is wrong or right. The later rule, commonly referred to as the "M'Naghten" Rule, takes into account only the appreciation of what is right and wrong, is outdated, and no longer constitutes the best based standard upon which the *mens rea* requirement in the criminal

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1. The standard has been adopted by all but one of the United States Courts of Appeal. (See *United States v. Freeman*, 357 F.2d 606 [2nd Cir. 1966]; *United States v. Currens*, 290 F.2d 751 [3rd Cir. 1961]; *United States v. Chandler*, 393 F.2d 920 [4th Cir. 1968]; *Blake v. United States*, 407 F.2d 908 [5th Cir. 1969]; *United States v. Smith*, 404 F.2d 720 [6th Cir. 1968]; *United States v. Shapiro*, 383 F.2d 680 [7th Cir. 1967]; *Pope v. United States*, 372 F.2d 710 [8th Cir. 1967]; *Wade v. United States*, 426 F.2d 64 [9th Cir. 1970]; *Wion v. United States*, 325 F.2d 420 [10th Cir. 1963], *cert den.* 377 U.S. 946 [1964]; *United States v. Brawner*, 471 F.2d 969 [D.C. Cir. 1972].) The only federal circuit which has not adopted the ALI standard is the first circuit, which has not yet decided the issue. (*Amador Beltran v. United States*, 302 F.2d 48 [1st Cir. 1962].)

law can be satisfied. Thus, the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit its continued usage.

The law, as it presently exists, would allow a person to commit the same act in two different states with the result being that in one, he or she might end up in penal confinement for life or on death row while the other may be treated in a hospital specifically designed for such individuals. It can no longer remain a question to be determined by each circuit or each state individually and, inasmuch as the universal adoption of Federal Courts has brought about the ALI Test, it is entirely proper for this Court to determine, in light of the scientific developments of this century, that the "M'Naghten" Rule no longer meets Constitutional standards and the remaining jurisdictions, which no longer constitute the majority,[2] should be instructed to abandon the outmoded rule and adopt one in line with proper and modern modes of psychiatry.

CONCLUSION

For these reasons, the writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Kansas.

Respectfully submitted,

RUSSELL SHULTZ, *Counsel for Petitioner*
CRAIG SHULTZ, *Of Counsel*
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2. The ALI standard has now been adopted in some form in twenty-six (26) states while only eighteen (18) states retain the pure M'Naghten Rule. *See State v. Smith*, 223 Kan. 203, 574 P.2d 548 (1977), at 216-219.

APPENDIX

APPENDIX "A"

No. 49,812

STATE OF KANSAS,
Appellee,
v.
MILDA R. SANDSTROM,
Appellant.

SYLLABUS BY THE COURT

In a prosecution for murder in the first degree the record is examined and it is *held*:

(1) The absence of the defendant from two in-chamber hearings did not violate her constitutional or statutory rights.

(2) The district court did not err in allowing an attorney employed by the brother of the victim to appear as special prosecutor.

(3) The district court erred in ordering defendant's counsel to turn over to the prosecution statements of witnesses and reports of investigators. Such error, however, was not prejudicial under the circumstances of the case.

(4) The district court did not err in refusing to strike the jury array.

(5) The district court did not err in instructing the jury in accordance with the so-called *M'Naghten* test of legal insanity instead of using the test recommended by the American Law Institute. (Following *State v. Smith*, 223 Kan. 203, 575 P. 2d 548 [1977].)

Appeal from Shawnee district court, division No. 3; E. NEWTON VICKERS, judge. Opinion filed May 5, 1979. Affirmed.

Russell Shultz, of Shultz, Fry, and Fisher, of Wichita, argued the cause and was on the briefs for the appellant.

Gene M. Olander, district attorney, and *Mark L. Bennett, Jr.,* special prosecutor, argued the cause, and *Curt T. Schneider,* attorney general, was with them on the brief for the appellee. The opinion of the court was delivered by

PRAGER, J.:

This is a direct appeal in a criminal action in which the defendant-appellant, Milda R. Sandstrom, was convicted of murder in the first degree (K.S.A. 21-3401). The factual circumstances surrounding the homicide are not directly involved in the appeal and need not be stated in great detail. Suffice it to say, the evidence presented in the case was undisputed that the defendant and her husband, Thad M. Sandstrom, had had an unsatisfactory and rather stormy marriage for several years. Mr. Sandstrom decided to file suit for divorce and did so while the defendant was visiting friends in Oklahoma. The defendant, receiving notice of the suit, returned to Topeka. While enroute she purchased a .32-caliber pistol and ammunition at Paul's Valley, Oklahoma. When she returned to her home in Topeka, she entered the house and shot her husband while he was in bed. At the time of the trial, the evidence was undisputed that the defendant had shot and killed her husband. The only defense presented to the charge was that the defendant was legally insane at the time the homicide occurred. The issue of the defendant's sanity was hotly contested. The jury rejected the defense of insanity and found the defendant guilty

of murder in the first degree. The defendant was sentenced to life imprisonment. Following her conviction and sentencing, and after her motion for a new trial was overruled, the defendant appealed to this court contending that she was denied a fair trial and alleging a number of trial errors.

The first point raised on the appeal is that the trial court erred in holding hearings in the absence of the defendant when the defendant had not waived her right to be present and her attorney had no authority to waive such right. This claim of error involves two hearings which were conducted by the district judge in the absence of the jury. The first hearing was on the defendant's motion for judgment of acquittal on the afternoon of December 1, 1977, after the state had rested its case. The jury was admonished and released to return to the court on the following Monday, December 5, 1977, at 9:00 a.m. The court, counsel for the parties, and the court reporter then retired to chambers for the presentation of the defendant's motion for judgment of acquittal. At this point it should be noted that, at the trial of the case, the State was represented by Mark L. Bennett, Jr., as special prosecutor, and by Gene M. Olander, district attorney of the Third Judicial District. The defendant, Milda R. Sandstrom, was represented by Robert D. Hecht, attorney-at-law, of Topeka. The record shows that after the judge and counsel along with the court reporter, arrived in the judge's chambers the following proceeding took place:

> "THE COURT: All right, we're in Chambers, and the State has rested their case, and Mr. Hecht has a motion.
>
> "MR. BENNETT: Before we take up the motion, Judge, I think we ought to reflect on the record that

the defendant is not here and that she has waived, by waiver of counsel, any right to be present.

"MR. HECHT: That's correct, Your Honor.

"THE COURT: All right.

"Following the argument upon the motion, the Court stated:

"THE COURT: Okay, I'll take it under advisement; and tomorrow afternoon, I'll get into this, and I'll let you know before the weekend. Thank you."

On the following Monday morning, December 5, 1977, at 8:45 a.m. an in-chambers hearing was held. Present were the trial judge and counsel for the parties. Also present was Gene Obley of the Shawnee County Department of Court Services. At the outset of this hearing, the court announced that it overruled the defense motion for judgment of acquittal that had been argued and taken under advisement on December 1, 1977. The other matter to be considered involved certain conduct on the part of one of the jurors. At that point Mr. Bennett called the court's attention to the fact that the defendant was not present, making the following statement:

"MR. BENNETT: Before you get into that, again, the defendant isn't here, and I think just so there is no question—

"Mr. HECHT: (Interrupting) She waives her right to be present.

"THE COURT: All right. . . ."

The trial court then placed on the witness stand Gene Obley, who testified in substance that one of the jurors had been making statements to several persons expressing her opinion as to the proper outcome of the Sandstrom

case. It appears that the juror had been in psychiatric care at the Topeka State Hospital. According to Obley, the juror had made the statement that if she were tried for this identical crime she would be sent up and she felt that Mrs. Sandstrom should be sent up. An acquaintance of the juror told Obley that the juror was a very irresponsible person. Mr. Obley was interrogated by Mr. Hecht on behalf of the defendant. In response to a question from Mr. Hecht, he testified that the juror had expressed an opinion as to what the outcome of the trial should be. It also appeared that at the voir dire the juror had been asked if she or any member of her family had ever had any psychiatric treatment to which question she replied that she had not. The juror was then called into chambers to testify. Under interrogation by the court, she testified that she had been treated in the outpatient department of Topeka State Hospital. Following this testimony, the court announced that it was excusing the juror and proceeded to do so. The trial court then selected by lot, in accordance with the statute, one of the alternate jurors, who thereafter fully participated as a juror in the case until a final verdict was reached. It should be noted that Mr. Hecht, counsel for the defendant, never objected to the discharge of the juror. It was obvious that the juror was hostile to the defendant and had expressed an opinion that Mrs. Sandstrom should be convicted.

The defendant maintains on the appeal that the holding of the two hearings in the absence of the defendant was prejudicial and constituted reversible error since those proceedings took place in the absence of the defendant. The defendant directs our attention to K.S.A. 22-3405, which governs the right of a defendant to be present at every stage of a trial in a felony case. The statute reads as follows:

"22-3405. Presence of defendant. (1) The defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes.

"(2) The defendant must be present, either personally or by counsel at every stage of the trial of a misdemeanor case."

Counsel for the defendant cites a number of early Kansas cases holding that the right of a defendant in a felony prosecution to be present during the proceedings is one that cannot be waived by counsel without the consent of the defendant and that the defendant in a felony case must be present at a hearing on a motion to quash an indictment or information and also at a hearing to determine whether or not a mistrial should be declared because of the illness of a juror. *State v. Hansford,* 76 Kan. 678, 92 Pac. 551 (1907); *State v. Clifton,* 57 Kan. 448, 46 Pac. 715 (1896); *State v. Kendall,* 56 Kan. 238, 43 Pac. 711 (1895); *State v. Reed,* 53 Kan. 767, 37 Pac. 174 (1894); *State v. Smith,* 44 Kan. 75, 24 Pac. 84 (1890); *State v. Myrick,* 38 Kan. 238, 16 Pac. 330 (1888).

Each of the cases cited arose under G.S. 1949, 62-1411 of the old code of criminal procedure. That section provided as follows:

"62-1411. Personal presence of accused. No person indicted or informed against for a felony can be tried unless he be personally present during the trial; nor can any person indicted or informed against for any other offense be tried unless he be present, either personally or by his counsel."

It should be noted that this former statute did not provide that the trial could proceed in the absence of the defendant, when the defendant's absence was voluntary, as is now provided in K.S.A. 22-3405. The later Kansas cases under G.S. 1949, 62-1411 hold that, in spite of the statutory language, the trial could proceed in the absence of the defendant when the defendant voluntarily absented himself from the proceedings. *State v. Chuning,* 201 Kan. 784, 443 P. 2d 248 (1968); *Cox v. Hand,* 185 Kan. 780, 347 P. 2d 265 (1959); *State v. Maxwell,* 151 Kan. 951, 102 P. 2d 109 (1940). All of these cases hold without equivocation that the defendant in a felony proceeding may waive his right to be present at any stage of the trial and, when he voluntarily absents himself from a portion of the trial proceedings, he cannot justifiably claim trial error.

The most recent case on the subject, which arose under K.S.A. 22-3405 (1), is *State v. Mantz,* 222 Kan. 453, 565 P. 2d 612 (1977). Mantz was convicted of murder in the first degree and on appeal contended that he had been denied a fair trial because of an in-chambers conference between the court and counsel concerning instructions in the absence of the defendant. In *Mantz,* we recognized the general rule to be that a defendant's constitutional and statutory rights to be present at his trial do not encompass proceedings before the court involving matters of law. We stated that such rights are violated only if the defendant is absent when the jury is hearing the case or when he is prevented from attending such other proceedings where his presence is essential to a fair and

just determination of a substantial issue. We construed K.S.A. 22-3405 to mean that the defendant must be present at all times *when the jury is present in the courtroom* except when the defendant is voluntarily absent, as set forth in the statute.

Under K.S.A. 22-3405, the defendant was entitled to be present at the hearing on her motion for judgment of acquittal and again at the hearing where inquiry was made as to the misconduct of one of the jurors. However, there was nothing to prevent the court from proceeding as it did in the absence of the defendant, provided the defendant had voluntarily absented herself from those proceedings. On the record from the trial court, we have no hesitancy in holding that the defendant did voluntarily waive her right to be present at the two hearings in question. The record before the trial court shows clearly that her counsel, Robert D. Hecht, a competent and able member of the Kansas Bar, advised the court that she had waived her right to be present. The record discloses that, at the time of the hearings, the defendant had been released on bond and was not in custody. There is nothing to show that she was prevented from being present or that she could not have been present had she desired to do so. Furthermore, it is clear from the record that the defendant, at her own request, did not appear at most of the pretrial proceedings and that in each instance Mr. Hecht advised the court that she had waived her right to be present.

There is included as an appendix to the appellant's brief an affidavit of Milda R. Sandstrom that states in substance that she had no knowledge of the hearing that took place on the afternoon of December 1, 1977, or of the hearing held on the following Monday, December 5, 1977, and that she did not waive her right to be present

or give authority to her attorney to waive her right to be present at any hearing. In response thereto, the State has attached an affidavit of Robert D. Hecht, as an appendix to appellee's brief, in which Mr. Hecht states in substance that Mrs. Sandstrom advised him that she did not wish to be present at hearings any more than was absolutely necessary and that, if her presence was not needed or required by him in the preparation of her defense, she did not wish to be present. It is further stated in the affidavit that Mrs. Sandstrom authorized him to conduct matters in her absence whenever, in his professional discretion, her presence was not deemed to be necessary. He further states that, in the absence of such authority, he would never have permitted, without objection, any proceeding to have occurred either in-court or in-chambers without her presence.

We cannot consider these affidavits. They were never brought to the attention of the trial court. It is not the function of this court on a direct appeal in a criminal case to consider matters which were not presented to the trial court and which are outside of the record. On the basis of the record now before us, it is undisputed that the defendant through her counsel waived her right to be present at the hearings held on December 1, 1977, and December 5, 1977. There is no showing that defense counsel ever presented a motion for a mistrial or to discharge the jury after the juror was released by the trial court and the alternate juror selected by lot to sit in accordance with statutory procedures. The defendant does not maintain on this appeal that the trial court erred in denying her motion for a judgment of acquittal at the close of the state's evidence. The defendant does not contend on this appeal that the trial court erred in discharging the juror who had expressed an opinion that the defendant should be convicted and imprisoned. We do not

see how the defendant could have been prejudiced in any way by her absence during the two hearings. Under all the circumstances we find the defendant's first point raised on the appeal to be without merit.

The defendant's next point is that the trial court erred in allowing Mark L. Bennett, Jr., to appear as special prosecutor over the objection of the defendant and without requiring the special prosecutor to prove his authority to act as such. On September 21, 1977, prior to trial, the defendant filed a motion requiring Mr. Bennett to produce or prove his authority to appear as attorney in the action. The motion was argued before Judge Michael A. Barbara who, after affording defendant a hearing, denied the motion. Judge Barbara wrote a letter to the district attorney and defendant's counsel in which the judge stated as follows:

> "Request for proof of authority of Mr. Bennett is denied. K.S.A. 19-717 provides that 'the prosecuting witness. . . may employ an attorney to assist the county attorney . . .'.
>
> "Here the complaining or prosecuting witness, Mr. Sandstrom is deceased. The defendant, Mrs. Sandstrom is charged with his murder. A brother of the deceased employed Mr. Bennett. The brother falls within the meaning of the 'prosecuting witness' under these facts."

It appears from the record that Mr. Bennett was employed as special prosecutor by Gus Sandstrom, the brother of the deceased. Gus Sandstrom was listed as a prosecution witness on the information and, even though he was not used as a witness during the course of the trial, he was closely affected and aggrieved as a result of the killing of his brother. We have no hesitancy in holding that

Gus Sandstrom was a "prosecuting witness" within the meaning of K.S.A. 19-717. It has long been the rule of law in this state that the family of the deceased in a murder prosecution is entitled to retain special counsel to assist the local prosecutor in the preparation of the case. *State v. Wilson,* 24 Kan. 189 (1880). In *Wilson* the special prosecutor was employed by the father of the deceased, who compensated the special prosecutor for his services. Here the appointment of Mr. Bennett as special prosecutor was made with no objections from the district attorney. The district attorney participated fully in the prosecution and there is nothing to show that he was not in full control of the case. Under the circumstances, we find no error in permitting Mr. Bennett to serve as special prosecutor.

The third point raised on the appeal is that the trial court erred in ordering the defendant's counsel to turn over to the prosecution all statements of witnesses and reports of interviews with prospective defense witnesses in contradiction of the statutes controlling discovery in criminal cases. The record shows that, at the commencement of the trial on request of defense counsel, the trial court ordered the prosecution to turn over to the defendant copies of the statements of all witnesses or reports of interviews of all persons whom the state intended to call as witnesses during the course of the trial. It was further ordered that the statements and reports be delivered to counsel for the defendant before each witness was called to the stand rather than waiting until each witness had testified, in order to avoid the necessity of a recess after each prosecuting witness's testimony and so that counsel for the defendant would have time to review the statements before conducting his cross-examination. The statements referred to in the trial court's order were delivered to the defendant's counsel. The State then proceeded to pre-

sent its evidence. The witnesses for the prosecution were cross-examined by defense counsel and the State then rested its case. At the close of the state's case, the prosecution orally moved the court for a similar order requiring the defendant's counsel, prior to the commencement of the defendant's case, to provide the State with any and all copies of statements that defense counsel had obtained from any of the witnesses that he intended to produce or any narrative reports of interviews with witnesses that were going to testify for the defense in the case. After arguments of counsel, in which defense counsel objected to the production of the statements and reports, the trial court sustained the state's motion and ordered that defense counsel deliver all the requested statements and reports to the prosecution prior to the defense's calling its witnesses to the stand.

The defendant contends that the order of the trial court was error and prejudiced her in her defense. We agreed that the order of the trial court was erroneous and not authorized under the Kansas statutes relating to the discovery of statements and reports in a criminal proceeding. The two statutes governing criminal discovery of statements and reports are K.S.A. 22-3212 and K.S.A. 22-3213. The statutes provide in part as follows:

> "22-3212. Discovery and inspection. (1) Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant (*a*) written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (*b*) results or reports of physical or mental

> examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; (*c*) recorded testimony of the defendant before a grand jury or at an inquisition; and (*d*) memoranda of any oral confession made by the defendant and a list of the witnesses to such confession, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney.
>
> "(2) Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, which are or have been within the possession, custody or control of the prosecution upon a showing of materiality to the case and that the request is reasonable. Except as provided in subsections (1) (*b*) and (1) (*d*), this section does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by officers in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses (other than the defendant) except as may be provided by law.
>
> "(3) If the court grants relief sought by the defendant under subsection (1) (*b*) or subsection (2) of this section, it may, upon motion of the prosecution, condition its order by requiring that the defendant permit the attorney for the prosecution to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or por-

tions thereof, *which the defendant intends to produce at the trial,* upon a showing of materiality to the case and that the request is reasonable. Except as to scientific or medical reports, this subsection does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, his agents or attorneys.

. . . ." (Emphasis supplied.)

"22-3213. Demands for production of statements and reports of witnesses. (1) In any criminal prosecution brought by the state of Kansas, no statement or report in the possession of the prosecution which was made by a state witness or prospective state witness (other than the defendant) shall be subject of subpoena, discovery, or inspection until said witness has testified on direct examination at the preliminary hearing or in the trial of the case.

"(2) After a witness called by the state has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement (as hereinafter defined) of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(3) If the prosecution claims that any statement ordered to be produced under this section contains

matter which does not relate to the subject matter of the testimony of the witness, the court shall order the prosecution to deliver such statement for the inspection of the court *in camera.* Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the prosecution and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(4) The term 'statement,' as used in subsections (2) and (3) of this section in relation to any witness called by the prosecution means—

"(*a*) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(*b*) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement."

It should be noted that K.S.A. 22-3212 (3) provides for a limited discovery by the prosecution only if the defendant has been granted an opportunity to inspect and copy or photograph under (1) (*b*), results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case or under subsection (2), books, papers, documents, tangible objects, buildings or places, or copies, or portions thereof, upon a showing of materiality to the case and that the request is reasonable. It must be emphasized that, under K.S.A. 22-3212 (3), the discovery by the prosecution is limited to the inspection of any copying of those specified items "*which the defendant intends to produce at the trial,*" upon a showing of materiality to the case and that the request is reasonable. Subsection (3) then states unequivocally that "[*e*]*xcept as to scientific or medical reports,*" this subsection does not authorize the discovery or inspection of *reports,* memoranda, or other internal defense documents made by the defendant, or *his attorneys or agents* in connection with the investigation or defense of the case, *or of statements made by the defendant or by prospective defense witnesses,* to the defendant, his agents or attorneys. It is crystal clear that K.S.A. 22-3212 did not authorize the order of the trial court directing defense counsel to deliver the statements of its witnesses, in whatever form, to the prosecution for discovery. While the prosecution was entitled under the statute to the medical reports relating to the defendant's mental condition, that statute did not authorize the discovery of the defense witnesses' statements or reports of interviews with defense witnesses.

K.S.A. 22-3213 relates to the disclosure of statements and reports of witnesses in criminal cases. That section is patterned after title 18, section 3500, of the United States Code, commonly known as the Jencks Act. It should

be noted that the Kansas statute provides for discovery by the *defendant* of any statements or reports made by a prosecution witness *after* the witness has testified on direct examination either at the preliminary hearing or at the trial. The statute does *not* provide for any pretrial discovery of statements of witnesses by the State. In *State v. Humphrey,* 217 Kan. 352, 537 P. 2d 155 (1975), we stated that the discovery provisions under the criminal code should be liberally construed and the scope of discovery should be as full and complete as is reasonably possible under the circumstances. No matter how liberally construed, however, the criminal discovery provisions contained in K.S.A. 22-3212 and K.S.A. 22-3213 do not provide for the discovery of a statement made by a witness *prior* to his testifying at the preliminary hearing or at trial. In fact, there is no express provision permitting the State to discover the statement of a defense witness either prior to the trial or after the defense witness has testified upon direct examination.

The State in its brief relies upon *United States v. Nobles,* 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975). In *Nobles,* the defendant was being tried in the United States District Court on charges arising from the armed robbery of a federally insured bank. Two key prosecution witnesses had identified the defendant as the robber. Defense counsel sought to impeach the credibility of those key witnesses by offering the testimony of a defense investigator regarding statements previously obtained from those witnesses by the investigator. These statements had been reduced to writing and were contained in the investigator's report in the possession of defense counsel. When the investigator was called as a witness, the district court stated to defense counsel that a copy of the investigator's report, inspected and edited by the

court *in camera* so as to excise references to matters not relevant to such statements, would have to be submitted to the prosecution, for inspection at the completion of the investigator's testimony. When defense counsel stated he did not intend to produce the report, the trial court ruled that the investigator could not testify about his interviews with the witnesses. On appeal, the Court of Appeals reversed, holding that both the Fifth Amendment and Federal Rules of Criminal Procedure No. 16 prohibited the disclosure condition imposed (501 F. 2d 146). The United States Supreme Court held that the federal district court had inherent power to require production of the previously recorded witness statements in order to facilitate full disclosure of all relevant facts. The Supreme Court stated that the Fifth Amendment privilege against compulsory self-incrimination, being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at the trial. The court further observed that Federal Rule No. 16 addresses pretrial discovery only and not trial practice. As to the work product privilege, the court held that the privilege was not absolute and was waived after the investigator took the stand as a witness with respect to any matters covered in his testimony.

We have concluded that *Nobles* is distinguishable from the case now before us. In *Nobles,* the court ordered defense counsel to produce the investigator's report only *after* the investigator had testified on direct examination. In *Nobles,* the trial court did not order defense counsel to produce the report or any statements prior to the calling of the investigator to the stand as a witness. In the case now before us, the trial court issued a blanket order directing defense counsel to produce statement of any witness that was going to testify for the defense in the case.

We hold that there was no statutory authorization for compelling defense counsel to furnish statements of his witnesses or reports of interviews prior to the time the defense commenced the introduction of its evidence.

We have concluded, however, that the error of the trial court in directing defense counsel to furnish statements of its witnesses and reports of its investigators was not prejudicial under the circumstances of this case. As noted above, there was no dispute as to the factual circumstances surrounding the homicide. The only issue in the case was the defendant's sanity at the time of the killing. The State was entitled, under K.S.A. 22-3212, to any *medical* reports concerning the defendant's mental state at the time the homicide occurred. We have before us in the record all the reports, statements, and memoranda of interviews prepared by defense counsel and his agents in connection with the investigation of the Sandstrom case. In a general way, it may be stated that these materials concern the prior conduct of the deceased, Thad M. Sandstrom, or of the defendant, or observations of various persons made in regard to the mental condition of the defendant both before and after the homicide occurred. We find nothing in the record to show that any of the statements were used for the purpose of impeaching or discrediting any witnesses called by either of the parties. There is nothing to indicate that any of the reports or statements furnished information which enabled the State to obtain evidence to establish the guilt of the defendant. Although the action of the trial court was erroneous in ordering production of the statements and reports by the defense counsel, we find that such action in no way prejudiced the right of the defendant to a fair trial and we decline to reverse the case on this point.

The defendant's fourth point is that the trial court erred in refusing to strike the jury array. By motion filed on November 10, 1977, counsel for defendant challenged the jury array and moved the court for an order striking all members of the jury panel scheduled to appear on November 14, 1977. The basis of the challenge was that the jury was not randomly selected by a judge of the district court, by a clerk of the district court, or by any person authorized by law to select prospective jurors, and that many members of the panel were excused without legal justification. On November 14, 1977, a hearing was held on the motion at the completion of which the trial court overruled the motion. In announcing his decision, Judge Vickers announced that the jury selection process utilized in the Sandstorm case was that which had been regularly followed for a number of years. In this regard the manner of selection of jury panels in Shawnee County is provided for in Rule 3.401 of the Rules of the Third Judicial District. It provides:

"*Selection of juries.* The following procedure shall be used for the selection of juries:

"1. At such times the court, or a division thereof, deems it necessary to secure a panel of jurors to serve herein, said court as jury commissioner, shall direct that a sufficient number of jurors be selected from the computer program used by the county from voter registration records and enumeration or census records of the county by random selection.

"2. The list of names so selected, and any additional names drawn herein, shall be certified by the jury clerk to the clerk. The jury clerk shall assist the commissioner in the preparation, drawing and maintenance of a record of such jury panels and by

performing such additional duties as may be directed by the commissioner.

"3. At least fifteen (15) days before the attendance date of a jury panel, the court shall summon the persons so selected by mailing a written notice to each such person by first class mail postage prepaid.

"4. In all cases where an insufficient number of jurors appear or if a panel be exhausted by challenge or otherwise before the jury is sworn, the court may order the sheriff or the clerk to summon a sufficient number of other persons to complete the jury. The court may order such additional members to be summoned within a reasonable time prior to attendance date."

It should be noted that Shawnee County, under the authority of K.S.A. 43-107, has appropriate base information programmed as a part of its computer operations. The names contained in the computer for selection of jurors are drawn from the voter registration and enumeration or census records of the county by random selections. A district judge is designated as jury commissioner, whose responsibility it is to see that jury panels are selected for use in the various divisions. This was the method used for the selection of the jury array that tried the Sandstrom case. Jean Jones, the jury coordinator for the Third Judicial District, testified that the jury array for the Sandstrom case was summoned in a special panel for the purpose of serving in that case or at some deferred date. She testified that the list was obtained from the jury commissioner's office. At the close of her testimony, she testified that the list came from Washburn University, but did not specify with particularity Washburn's position in the process. The jury selection process used in Shawnee

County is discussed in depth in *State v. Campbell,* 217 Kan. 756, 539 P. 2d 329 (1975). Following *Campbell,* the jury list included in the computer was expanded to include names drawn from the enumeration and census records of the county. The various components in the formula used to select a jury list are discussed at page 759 of the opinion. The selection of a jury list by computer is authorized by K.S.A. 43-107 and K.S.A. 43-163, which were enacted effective July 1, 1971. Pursuant to those statutes, the judges of the Third Judicial District by local Rule 3.401 provided the method for selection of jury panels directly from the computer without the necessity of drawing cards from the wheel manually. In *State v. Campbell,* this court approved the method of jury selection used in Shawnee County and we see no reason to change our ruling in that regard. As pointed out in *Campbell,* no one arbitrarily chose which person or persons on the voter registration records would be selected for the jury lists. Neither bias nor purpose tainted the method chosen. The entire jury list as a group was selected at random. We fail to see how any prejudice could have resulted from the jury selection process accomplished pursuant to Rule 3.401. We also have no hesitancy in holding that there is nothing in the record to show that in selecting jurors or in excusing certain jurors there was any systematic exclusion of members of any particular class from jury service. Furthermore, there is no showing that the defendant was prejudiced in any way by the method used in selecting the trial jurors. *State v. Roth,* 207 Kan. 691, 486 P. 2d 1385 (1971).

The last point raised by the defendant is that the trial court erred in instructing the jury in accordance with the so-called *M'Naghten* test of legal insanity instead of using the test recommended by the American Law Insti-

tute. In the recent decision of this court in *State v. Smith,* 223 Kan. 203, 574 P. 2d 548 (1977), the majority of the court, in a comprehensive opinion, rejected the American Law Institute test and chose to retain the *M'Naghten* test. In *Smith,* two of the justices dissented. The majority of the present court are still of the opinion that a correct result was reached in *State v. Smith* and that the *M'Naghten* rule should be followed in Kansas. The court, therefore, rejects the contention of defendant that it was error for the trial court to instruct the jury on the *M'Naghten* test for legal insanity.

The judgment of the district court is affirmed.

APPENDIX "B"

IN THE
DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

77-CR-546

STATE OF KANSAS
PLAINTIFF
vs.
MILDA R. SANDSTROM
DEFENDANT

JOURNAL ENTRY OF JUDGMENT

(Filed December 25, 1978)

Now on this 14th day of November, 1977, the above-entitled matter comes on regularly for trial. The defendant appears in person and by her attorneys Robert D. Hecht and Robert Keshan. The State appears by Gene M. Olander, District Attorney, and Mark L. Bennett, Jr., Special Prosecutor. The parties hereto announce themselves ready for trial and voir dire commences.

Thereafter, a jury consisting of the following named persons, to-wit: Dana N. Holstrom, Fred Dumas, Miguel Hernandez, Linda S. Elliott, Farley R. Bonnett, Margaret E. Gillmore, Marcus L. Howland, Lucinda S. Darr, Karen E. Alfrey, Carl F. Hodges, Yvonne J. Jenkins, and Charles T. Bernauer were selected as the regular jurors to try the cause herein along with Ernest L. Kratina and Jerry M. Lee as alternate jurors.

Thereafter, the State gave it's opening statement and presented evidence until such time as it rested it's case.

Thereafter, the Court disqualified one of the regular jurors, to-wit: Linda S. Elliott and by lot replaced said juror with one of the alternate jurors, to-wit: Jerry M. Lee.

Thereafter, the defendant gave his opening statement and presented evidence until such time as the defendant rested.

Thereafter, the State presented it's rebuttal case and rested at which time the defendant presented surrebuttal evidence and rested it's case.

Thereupon, the Court instructed the jury orally and in writing and arguments were presented by counsel for both sides.

Thereafter, the jury retired to deliberate on it's verdict and on December 9, 1977, the jury returned it's unanimous verdict finding the defendant, Milda R. Sandstrom, guilty of the offense of Murder in the First Degree as defined by K.S.A. 21-3401.

Thereupon, the Court ordered the defendant to be taken into custody pending filing of a motion for a new trial.

Thereafter, on Thursday, January 19, 1978, the parties hereto appear as before, at which time the parties presented oral arguments upon the defendant's written motion for a new trial or for directed verdict.

Thereafter, the Court upon hearing arguments of respective counsel from both sides and being fully and duly advised in the premises, overruled the defendant's motion for a new trial or for directed verdict and sentenced the defendant to the custody of the Secretary of Corrections for a term of life for the offense of Murder in the First Degree as defined by K.S.A. 21-3401. The sentence is

imposed herein under the provisions of K.S.A. 21-4501(a). The defendant is to be credited with all time spent in the Shawnee County Jail awaiting trial which amounts to 84 days. The effective date of sentence is October 27, 1977.

Thereafter, on Monday, January 23, 1978, the Court overruled the defendant's motion to set an appeal bond.

IT IS THEREFORE BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant, Milda R. Sandstrom be, and is hereby sentenced to the custody of the Secretary of Corrections for a term of life for the offense of Murder in the First Degree as defined by K.S.A. 21-3401. Sentence is imposed under the provisions of K.S.A. 21-4501(a).

IT IS FURTHER ORDERED that the defendant be given credit for all time spent in the Shawnee County Jail awaiting trial, amounting to 84 days. The effective date of sentence is October 27, 1977. The Court further orders that the defendant be evaluated and a report of said evaluation be submitted to the Court within 120 days.

/s/ (Illegible)
Judge of the District Court
Third Division

Approved By:

/s/ Gene M. Olander
Gene M. Olander
District Attorney

/s/ Robert D. Hecht
Robert D. Hecht
Attorney for the Defendant

APPENDIX "C"

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 49,812

State of Kansas, Appellee,

v.

Milda R. Sandstrom, Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

Motion for Rehearing considered and DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

DATE June 13, 1979